UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

GOOD SHEPHERD MANOR, INC.

and

Cases 25-CA-191404
25-CA-194176
25-CA-198163

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME). COUNCIL 31 AFL-CIO

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DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Bradley, Illinois on September 5, 2017. The American Federation of State County and Municipal Employees (AFSCME). Council 31 AFL-CIO (the Union or Charging Party) alleges that Good Shepherd Manor, Inc. (Good Shepherd or Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act)[1] in July 2016 by unilaterally: (1) withholding merit-based wage increases from bargaining unit employees; and (2) changing the duties and pay of bargaining unit employees. It is further alleged that Good Shepherd undertook such actions without prior notice to the Union and affording it an opportunity to bargain to a good-faith impasse for a collective-bargaining agreement. Finally, the complaint alleges that, since February 27, 2017, Good Shepherd has failed and refused to bargain collectively and in good faith with the Union. Good Shepherd denies the allegations, alleges the charges were untimely filed, and avers that the issue of merit-based wage increases was deferred to the pending collective-bargaining process. Additionally, Good Shepherd concedes that it cancelled a bargaining session scheduled for February 28, but contends that it did so for a legitimate reason and subsequently met with the Union for bargaining on several occasions.

[1] 29 U.S.C. §§ 151-169.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Good Shepherd and the Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

Good Shepherd, a not-for-profit corporation with an office and place of business in Momence, Illinois, has been engaged in providing services for adults with intellectual and developmental disabilities. In conducting its operations on an annual basis, Good Shepherd derives gross revenues in excess of $500,000, and purchases and receives goods valued in excess of $50,000 directly from points outside the State of Illinois. Good Shepherd admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Good Shepherd's Operations*

Good Shepherd operates a residential training facility for approximately 120 male residents with intellectual and developmental disabilities in Momence, Illinois. It encompasses 14 group homes and employs approximately 145 employees. Approximately 80 employees are employed as Care Workers, also known as direct service providers or by position number 811. These positions are supervised by Qualified Intellectual Development Professionals (QSP/RSD). They report to the Residential Service Director, Kristen Stockle.

Good Shepherd policies and practices are approved by its Board of Directors, which has delegated authority to an Executive Committee comprised of several Board of Directors members and managers, including Bruce Fitzpatrick, the organization's president. John Combs served as human resources director at all relevant times until February 14, 2017.

B. *The Parties' Collective-Bargaining History*

On November 30, 2015, the National Labor Relations Board (the Board) certified the Union as the exclusive collective-bargaining agent for the purposes of collective bargaining on behalf of approximately 120 Good Shepherd employees within the meaning of Section 9(a) of the Act (the Unit):

> All full-time and regular part-time regular part-time non-professional employees including careworkers, instructors, trainers, infirmary technicians, receptionists, custodial service workers, maintenance employees, administrative support staff, assistant program directors, assistant supervisors, food service workers, secretaries, licensed practical nurses and transport staff employed by the Employer at its facility located at 4129 N. Rt. 1-17, Momence, IL 60954, but excluding all professional employees, managerial employees, and guards and supervisors as defined by the Act.

Richard Wessels, Good Shepherd's labor representative, initially met with David Dorn, the Union's representative, on February 2, 2016. The parties began negotiations for a first collective bargaining agreement on April 26. During the first collective-bargaining meeting, the Union proposed to start negotiations over non-economic issues. While the parties failed to agree on that procedure, they met for eight more bargaining sessions in 2016.

On January 11, 2017, James Mazzuchi, a Unit employee, filed an RD petition with the Board in Case 25-RD-191100 seeking an election on the ground that the Union had lost majority status. [2] The Union responded one week later by filed a charge alleging the commission of several unfair labor practice charges by Good Shepherd in Case 25-CA-191404. The charge also sought to block the requested election from being held.[3]

The parties held a bargaining session on February 6, 2017 and scheduled another bargaining session for February 28. On February 27, however, Good Shepherd injected itself into the Union's controversy with Mazzuchi by filing an RM petition with the Board, Case 25-RM-193811, alleging there existed "a good faith uncertainty about majority support for an existing representative" and requesting that the Board proceed to order the requested election.[4] On the same day, Wessels emailed Dorn cancelling the bargaining session scheduled for February 28 on the ground that:

> Good Shepherd has objective evidence demonstrating that [the Union] no longer has majority support and we have filed an RM Petition this morning. We intend to work with the NLRB to get an election scheduled as soon as possible so that issue can be resolved. Understand that Good Shepherd is not withdrawing recognition, but postponing the meeting with the objective of resolving the question of majority status as soon as possible. We are suggesting an election date of March 15.[5]

About an hour later, Wessels supplemented that communication by attaching an annotated draft agreement that he prepared for the cancelled meeting on February 28. He suggested Dorn distribute the draft for consideration while also urging Dorn to "move forward expeditiously to resolve the question of majority status through the NLRB secret ballot election process." Dorn protested that decision shortly thereafter, insisting that the Union was ready to meet and rejecting Wessel's rationale for cancelling the meeting. He warned that the unilateral cancellation would be tantamount to "a refusal to bargain in violation of the Act." Wessels responded a few minutes later, reiterating his earlier position.[6]

After researching the legal issues relating to the RM and RD petitions, Wessels concluded by February 28 that it would not be proper to withdraw recognition of the Union. He did not, however, communicate that to the Union.[7] Over the course of the next two months, the

[2] R. Exh. 17 at 23-24.
[3] GC Exh. 1(a).
[4] R. Exh. 18.
[5] R. Exh. 19.
[6] R. Exh. 20-21; GC Exh. 11.
[7] I credit Wessels testimony that he needed time to research the issues relating to the competing petitions, but he figured it out by February 28. His subsequent email confirms that he delayed bargaining for more than two months in an attempt to force the Union into an election. (Tr. 178-185.)

Union amended the blocking charge in Case 25-CA-191404 and filed additional blocking charges in Cases 25-CA-194176 and 25-CA-198163. Portions of the charges in Cases 25-CA-191404 and 25-CA-194176 were ultimately dismissed and related appeals denied.

On April 24, Dorn responded to Fitzpatrick's email stating Good Shepherd's "desire to implement a shift premium of $1/hour for all staff on duty between the hours of 12 a.m. and 8 a.m." He expressed the Union's agreement with the changes, but suggested they did not go far enough and urged Good Shepherd to resume bargaining to negotiate over issues relating to wages, the disciplinary process and worker safety.[8] Wessels responded on April 27:

> At the conclusion of your letter you asked when [Good Shepherd] is available to resume negotiations. [Good Shepherd] postponed the February 28 meeting after the RM petition was filed and urged that the question of majority status be resolved by an NLRB secret ballot election, which [Good Shepherd] suggested be held on March 15th. This issues would have been resolved long ago if the parties had moved ahead with the expedited election. We indicated back at that time that we were not withdrawing recognition, only postponing that one meeting. We stand ready to meet. If you wish to meet, please contact me and we will work out a mutually satisfactory date. Thank you.[9]

Bargaining resumed on May 25, and the parties have met for on several occasions since that time.[10]

C. Deferral of Merit Raises to Collective-Bargaining

Good Shepherd's fiscal year runs from July 1 to June 30. In fiscal years 2002, the State of Illinois passed a budget that specifically provided for a $1.00 per hour wage increase for most employees at Good Shepherd who held positions which are now in the Unit. In that year, Good Shepherd did not give any merit-based wage increases. Good Shepherd also did not give any merit-based wage increases in fiscal years 2003 and 2005, the latter attributed specifically to a lack of State funding. With the exception of fiscal year 2015, the aforementioned employees have received merit-based wage increases of 1% or more on their anniversary dates from fiscal years 2006 through 2016. Later during the 2015 fiscal year, however, the Illinois legislature granted additional funding and the Board of Directors provided employees with a 1.5% annual increase in December 2014.[11]

On February 12, 2016, prior to the parties' first bargaining session, Fitzpatrick confirmed a continuation of Good Shepherd's practice of awarding annual merit-based wage increase in an email to Dorn:

> First, prior to the election, Good Shepherd Manor was providing on average, a 1% merit increase to employees at the time of their anniversary. This was a Board approved budget

[8] GC Exh. 12.
[9] GC Exh. 13.
[10] R. Exh. 16.
[11] The historical chart showing increases since 2001 omitted fiscal years 2003-2004 to 2009-2010, but the parties stipulated that they all reflected annual wage increases of at least 1% (R. Exh. 9; Tr. 10.)

allocation for fiscal year 2016. It is our intention to continue this practice through fiscal 2016.

Secondly, in an effort to recognize and appreciate staff who are working extra hours in the group homes to cover vacancies and absences, we are planning a weekly drawing. The plan is to enter the name of every staff member who works extra hours into a drawing for a chance to win one of two $50.00 cash gift cards. The details of this program are attached. I plan to announce this new program on Thursday 2/18. Please let me know if you have any concerns about this program, otherwise we will proceed as planned.[12]

On June 2, Good Shepherd's Executive Committee Minutes stated, in pertinent part, the Board of Directors determination that "the FY17 budget should not reflect any wage increase since this will be deferred to the collective bargaining process.[13] Fitzpatrick informed staff of the Board of Directors' decision to defer merit wage increases on June 16 and the change was implemented in conjunction with unit members' performance evaluations that followed. He did not, however, inform Dorn or any other Union representative of that decision. At some point prior to the bargaining session of September 14, however, Dorn was informed by another Union representative that a Unit employee reported that he/she did not receive the customary merit wage increase for FY 2017. Dorn then raised that concern at the beginning of bargaining on September 14, asking if Unit employees were not getting raises because of the Union. Dorn asked if Combs knew anything about that and, if so, the remarks should stop. Combs professed ignorance about any such rumors.[14]

In the written personnel evaluations that followed, Combs or Fitzpatrick conveyed the decision to defer wage increases in the "recommended merit wage increase section" in various ways: "Not applicable - To be determined by collective bargaining" or "No change" or "0% due to negotiations" or "Increases deferred to collective bargaining process" or "No increase during this evaluation period" or "Not at this time due to collective bargaining" or "O due to contract negotiations" or "Not applicable at this time, union negotiated" or "no merit increase due to collective bargaining."[15] Good Shepherd did, however, give a 1% raise to all non-bargaining unit employees.

On January 9, 2017, Dorn emailed Combs requesting that Good Shepherd "continue its practice of providing wage increases to bargaining unit employees." He also shared his understanding that wage increases were being withheld "due to union negotiations" and warned that the failure to restore the pre-existing practice of providing wage increases would violate the status quo. Combs responded the same day, attaching Fitzpatrick's February 12, 2016 letter regarding a continuation of the 2016 fiscal year increases. However, with respect to fiscal year 2017, "the Board decided to leave the increases up to the collective bargaining process."[16] On

[12] GC Exh. 2.

[13] GC Exh. 3; R. Exh. 12 at 1.

[14] Dorn's credible and undisputed testimony as to the initial source of the information was premised on double hearsay, but I overruled that objection because there was ample corroboration for the rumored deferred wage increase at that point. (Tr. 52-55.)

[15] R. Exh. 12-13; GC Exh. 4.

[16] GC Exh. 9-10; R. Exh. 11.

January 18, the Union filed the aforementioned charge alleging, in pertinent part, that Good Shepherd "unilaterally withheld wage increases from bargaining unit members for the stated reason of union negotiations."

On June 1, Fitzpatrick emailed Dorn that Good Shepherd was also considering foregoing merit-based wage increases for FY 2018 (July 1, 2017—June 30, 2018) "unless we receive an increase in funding from the state; as was the case last year (fiscal 2017)."[17] On June 7, the Board of Directors adopted the budget for FY 2018, again omitting merit-wage increases, based on the Finance Committee's recommendation "that merit pay increases . . . not be provided this year unless we receive an increase in funding from the state, as was the case last year.[18]

The following month, the Illinois legislature enacted a budget appropriating a $.75 per hour wage increase for Unit employees. That appropriation was implemented and passed through to Unit employees beginning with the September 29 payroll checks, retroactive to August 1, just as was the case in 2002. Good Shepherd continued, however, to defer Unit employees' merit increases into the 2018 fiscal year, while paying them to non-Unit employees.

D. Creation of Mentor Positions

The basic care worker position at Good Shepherd is referred to as the "811 position." That refers to the job description # 811entitled, "Care Worker – Care Worker, Flexi." The position includes various responsibilities relating to the supervision and care of Good Shepherd's residents, including hygiene care, providing meals and administering medication. 811 care workers are required to rotate shifts and perform "job related duties as assigned by the QSP/RSD." These duties include but are not limited to: detailed home care; filing of resident records in the home; medical trips, airport trips, or other outings; assisting in Day Program services; and providing increased resident supervision.[19]

Prior to the Union's certification as Unit employees' labor representative, Good Shepherd had a history of adjusting the Care Worker #811 position. The most recent change was in 2009, when Good Shepherd created the Care Worker, Infirmary Technician #811E position, which entailed the responsibilities of a Care Worker #811but primarily assigned the employee to infirmary duties. Unlike some of the previous adjustments to the 811 position, the 811E position was not accompanied by a wage rate increase.[20]

On November 18, 2016, without consulting with the Union, Fitzpatrick created the new position of Care Worker, Mentor, # 811F, and reclassified 6 care workers into that position: Tracy Jackson, Brittany Ryan, Latrice Ross, Keith Cross, Algena Flournoy and Candace Chapman. These employees were to "receive a $0.25 hourly pay increase for their increased responsibilities, which required them to train new employees in caring for residents and provide supervisors with performance information. Their payroll change forms indicated that each was "receiving a temporary promotional pay increase of an additional $.25 per hour . . . for

[17] R. Exh. 11 at 4.
[18] R. Exh. 12 at 3.
[19] GC Exh. 5; R. Exh. 2.
[20] R. Exh. 3-7.

assignment of duties and responsibilities associated with the new Mentorship program. Mentors will assist newly hired caseworkers in learning the skills of their position. The Mentorship is a pilot program that is to be evaluated in 6 months (May 2017)." (emphasis in original)[21]

After Dorn was informed about the change by a Unit employee, the Union filed a charge on May 5, 2017 in Case 25-CA-198163 alleging that Good Shepherd failed to bargain in good faith in violation of Section 8(a)(5) by unilaterally changing work assignments, removing unit work and increasing pay rates on November 15 and December 2016.[22] The Union amended that charge on June 29, alleging that "[s]ince on or about November 2016, [Good Shepherd] unilaterally assigned additional training duties and increased the wages of bargaining unit members without notice or bargaining with the Union."

LEGAL ANALYSIS

I. CANCELLATION OF FEBRUARY 28TH BARGAINING SESSION

Section 8(a)(5) of the Act requires that employers bargain with collective-bargaining representatives. Section 8(d) of the Act highlights that duty as a "mutual obligation of the employer and the representative of the employee to meet at reasonable times and confer in good faith …."[23] The determination of whether parties engaged in good faith bargaining is analyzed under the totality of circumstances. *Regency Serv. Carts, Inc.*, 345 NLRB 671, 671 (2005) (citing Pub. Serv. Co. of Okla., 334 NLRB 487, 487 (2001), *enfd.*, 318 F.3d 1173 (10th Cir. 2003) (the Board examines the totality of the party's conduct, both away and at the bargaining table, when looking to its obligation to bargain in good faith); *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984) (the Board looks to the employer's overall conduct to determine good faith bargaining). The Act imposes an obligation to meet at reasonable times and places. *St. Louis Comprehensive Neighborhood Health Center*, 248 NLRB 1078, 1082 (1980). The Board in *Atlanta Hilton & Tower* listed several actions that indicate a lack of good faith bargaining, such as delay tactics, unreasonable bargaining demands, unilateral changes to mandatory subjects of bargaining and efforts to bypass the union, among others. *Atlanta Hilton*, 271 NLRB at 1603 (citations omitted).

Under the totality of circumstances underlying the cancellation of the February 28 meeting, and considered in conjunction with Good Shepherd's subsequent unilateral changes, it is clear that Good Shepherd refused to bargain in good faith. Good Shepherd alleges that it was under a good faith uncertainty about the Union's majority support and notified Dorn of this circumstance. It further notified Dorn that Good Shepherd was not withdrawing recognition, but merely postponing the meeting dates.

An employer is certainly allowed to insist on an election as long as there remain doubts in good faith that a majority of the employees have selected the union as their bargaining representatives. *Aaron Bros. Co. of California*, 158 NLRB 1077, 1078 (1956). Wessel realized

[21] GC Exh. 6-8; R. Exh. 1-2.

[22] Dorn's testimony as to when he first learned about the new mentor position was credible and unrefuted. (Tr. 63-64.)

[23] 29 USC §158(d).

by February 28, however, that there existed no legitimate basis for delaying bargaining based on the competing RD and RM petitions. Rather than share that information, he chose to ride out another two months in an effort to pressure the Union into an election. Only after the Union requested a return to the bargaining table did Good Shepherd acquiesce. Under the circumstances, Good Shepherd violated its duty to bargain in good-faith by engaging in dilatory foot-dragging with the stated goal of forcing the union into an election.

II. WITHHOLDING OF ANNUAL MERIT-BASED WAGE INCREASE

The General Counsel and Union allege that Good Shepherd violated Section 8(a)(5) and (1) of the Act by withholding customary merit-based merit-wage increases from Unit employees without going through the collective bargaining procedure or to good faith impasse. Good Shepherd denies these allegations and insists that the decision to provide an increase lies within the proper discretion of its Board of Directors.

An employer violates Section 8(a)(5) and (1) of the Act by making unilateral changes during the course of the bargaining relationship on mandatory subjects of bargaining, because bypassing the duty to negotiate impedes the objectives of Section 8(a)(5). *NLRB v. Katz*, 369 U.S. 736 (1962) (a unilateral change in the conditions of employment is a violation of the Act because it circumvents the duty to negotiate, thereby impeding the objective of Section 8(a)(5).). The mandatory subjects of bargaining which an employer and union must negotiate are those that fall within Section 8(d) of the Act. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). These subjects are varied and span a wide spectrum.

In evaluating a discontinuance of a merit-based wage increase, the Board looks to whether there is a "pattern and practice" in place. *WAPA-TV*, 317 NLRB 1159, 1160 (1995), *enfd.* 82 F.3d 511 (1st Cir. 1996). Cf. *American Mirror Co.*, 269 NLRB 1091 (1984) (withholding raises did not constitute a unilateral change since raises were given at "random irregular intervals"); *U.S Postal Service*, 261 NLRB 505 (1982) (accord). In *WAPA-TV* the Board affirmed a violation of the Act for a failure of an employer to stop giving merit based increases after having done so for the last eighteen years. Though the size of the increase varied, as here, the practice continued unabated. *WAPA-TV,* 317 NLRB at 1159. The idea guiding this decision is that "[w]henever the employer by promises or by course of conduct has made a particular benefit part of the established wage or compensation system, then he is not at liberty unilaterally to change this benefit either for better or worse during…. the period of collective bargaining" *Daily News of Los Angeles,* 315 NLRB 1236, 1238 (1994) (Citation omitted).

Good Shepherd argues that the wage increase lay within its own discretionary ambit, were not automatic, and the practice of giving merit-based increases was non-uniform. It is undisputed, however, that Good Shepherd had an established practice of granting employees merit-wage increases of at least 1% during nearly all fiscal years between 2004 and to 2016. There were exceptions in a few years due to the lack of State funding, but those instances hardly transform the practice into one that was irregular. After the certification of the Union in November of 2016, Good Shepherd maintained this practice for fiscal year 2016 but discontinued it for the 2017 fiscal year for only Unit employees, specifically deferring merit-wage increases to the collective-bargaining process.

Good Shepherd further notes that in the fiscal year 2015 the employees did not receive a merit based increase, but rather there was a general 1.5% wage increase for all employees. It further highlights two important points: (1) there were discretionary budgetary issues that it was dealing with during that time limiting its ability to provide the wage increases; and (2) by Illinois law, bargaining unit employees were already slated to receive a $.75 per hour wage increase pursuant to the state budget. The state budget-based increase was similar to fiscal year 2002, which then led to Good Shepherd skipping its practice of increases in 2002 and 2003. The circumstances in those prior years was distinguishable from Good Shepherd's decision to defer merit-wage increases for only Unit employees in fiscal years 2017 and 2018 – the withholding of increases was not based on the availability of funding, but rather, the arrival of the Union.

Good Shepherd's argument that it properly deferred the question of wage increases to the collective bargaining process by notifying the Union of its intention also fails. A notice does not obviate the duty to maintain the status quo of wage increases and consult with the Union before making unilateral changes. In *American Packaging Corp.*, 311 NLRB 482 (1993), the Board found that an employer's failure to pay the usual bonuses, after a determination of its budgetary needs, and in consultation with the union, was not a violation of the Act because the employer did not permanently discontinue the program. *See also Stone Container Corp.*, 313 NLRB 336 (1993) (no violation where the union consulted with the employer about temporarily forgoing wage increases due to economic reasons). In the present case, the key predicate of union consultation is missing because the decision to withhold the increase did not come in concert with union representatives. It was an independent decision that Good Shepherd made alone.

There is also no credible evidence for the notion that Good Shepherd used an existing process to determine whether merit-based wage increases should be granted. The Board endorsed the utilization by employers of their regular process in *American Packaging* and *Stone Container* in *Daily News of Los Angeles*, emphasizing in both cases that the employers applied preexisting system for granting raises and determined after applying their processes that increases were not feasible. *Daily News of Los Angeles*, 315 NLRB 1236, 1240 (1994). As previously noted, the only process customarily relied upon by Good Shepherd was one that determined the availability of funding for the raises upon the completion of employees' performance evaluations. As previously noted, Good Shepherd deviated from that regular process for fiscal years 2017 and 2018 because of the Union.

In sum, three important factors derail Good Shepherd's discretionary argument: first, Good Shepherd failed to consult the Union on its change; second, merit-based increases occurred at a fairly regular interval for a period of 13 years,[24] and third, employees had an expectation that they would be evaluated according to the merit-based process. See *Auto Workers* (*Udylite Corp. v. NLRB*, 455 F.2d 1357 (1971), enfg. 183 NLRB 163 (1970) (discontinuance of the annual policy of merit-based wage increases, after union certification violated the Act because the employees had an expectation of evaluation and consultation with Union prior to suspension). In the face of an established practice that was fixed, but discretionary as to the amount, Good

[24] As Fitzpatrick noted in his email on February 12, "It is our intention to continue this practice through fiscal 2016." GC Exh. 2. This indicates that the *practice* in place was one of providing merit-based increases and further indicates that this was not an irregular occurrence.

Shepherd violated section 8(a)(5) and (1) by unilaterally withholding the annual merit-wage increases from Unit employees without first consulting with the Union.

III. CHANGE TO CARE WORKER DUTIES

The complaint alleges that Good Shepherd unilaterally modified the 811 Care Worker position by adding mentoring responsibilities and failed to afford the Union an opportunity to bargain. Good Shepherd maintains that it has a long standing past practice of modifying that position. It also claims that the Care Worker/Mentor position is temporary, the 6 employees continue to perform the function of Care Workers and simply receive a $.25 per hour wage increase.

Where a unilateral change in the terms or conditions of employment is material, substantial, and significant, such a change constitutes a violation of Section 8(a)(5) of the act. *Alamo Cement Company*, 277 NLRB 1031 (1985) (finding that a change in classification where the employee performed essentially the same function as before the change in classification was not a substantial, material, and significant change); *Angelica Healthcare Services Group*, 284 NLRB 844, 853 (1987) (noting that there is a statutory bargaining obligation where the unilateral change affecting the terms and conditions of employment of bargaining unit employees is material, substantial and significant). Not every unilateral change however constitutes a violation of the bargaining obligation. *Compare J.W. Ferguson & Sons*, 299 NLRB 882, 892 (1990) (finding that the change was not material, substantial, and significant where the employer increased the lunch break by five minutes and decreased the afternoon break by five minutes; *Weather Tec Corp.*, 238 NLRB 1535 (1978) (finding the employer's decision to end paying for coffee supplies that employees used was not a material, substantial and significant change) *with The Bohemian Club & Unite Here! Local 2*, 351 NLRB 1065, 1066 (2007) (finding changes to cleaning duties material, substantial, and significant because cooks had to work an extra 30 minutes to accomplish new tasks, and involved new tasks such as wiping down walls, counters, refrigerator doors, and sweeping the floor) *and Salem Hosp. Corp.*, 360 NLRB 768, 769 (2014) (finding a change in the dress code policy a material, substantial, and significant change to the terms and conditions of employment because the policy change had a significant financial impact on employees since it rendered their old uniforms useless.). Good Shepherd's change included changes to the duties of the workers, including a training and mentorship role, and a wage increase of $0.25 per hour. Thus, the issue here is to determine whether the added responsibilities and the wage increase are a material, substantial and significant enough change to the Unit employees' terms and condition of employment.[25]

When the change is simply one in the employee's title classification without a substantial change in duties and a slight increase in the hourly wage, that change does not constitute a material, substantial and significant change in the terms or conditions of employment. *Alamo Cement Co.*, 277 NLRB 1031 (1985). Here, Good Shepherd changed the duties of six Care Workers by adding mentoring responsibilities that had supervisory characteristics. They were to train new employees, report on their performance to supervisors, and receive a $.25 hourly pay increase. These were all material and substantial changes to the Care Workers duties and pay.

[25] Good Shepherd argues that it had an established past practice of changing the duties. That fact ignores the fact that the Union was not Unit employees' certified representative at those times.

Under the circumstances, Good Shepherd also violated Section 8(a)(5) and (1) of the Act by unilaterally modifying the duties and pay of its employees.

IV. STATUTE OF LIMITATION DEFENSE

Good Shepherd's statute of limitation defense also fails. It argues that the Union failed to file the unfair labor practice charge within the statute of limitation period pursuant to Section 10(b) of the Act. The limitation period for an unfair labor practice charge is 6-months, and the burden of proof lies with the party raising the defense. *CAB Assocs.*, 340 NLRB 1391, 1403 (2003). The time period begins to toll when the charging party makes a "clear and unequivocal" notice of the unfair labor practice. *Id.* at 1403. The notice may be either actual or constructive. *Id.* at 1391.

Good Shepherd contends that the period began to toll on June 16, 2016, when during a staff meeting Fitzpatrick notified employees, including bargaining unit employees who were present, that Good Shepherd did not plan to budget for wage increase since this will be determined through a collective bargaining process. It further argues that since the applicable charge was filed on January 18, 2017, it falls outside of the 6-month statutory period and the unfair labor practice claim should be time barred.

The period under the statute of limitation begins when a party has "clear and unequivocal" notice of the violation and the party raising the defense has to prove that the filing party had actual knowledge or constructive knowledge of the unfair labor practice more than 6 months before the charge was filed. *See M & M Auto. Grp., Inc.*, 342 NLRB 1244, 1246 (2004) *(*concluding that the Union lacked actual or constructive knowledge because there was no evidence that Union knew of changes, it was not informed by the Respondents of the changes, even though the Respondent was bargaining over wages and promotions while making the changes). Knowledge on the part of the Unit employees can only be imputed where the conduct in question was sufficiently "open and obvious" to provide clear notice or whether the filing party would have discovered the conduct with reasonable or due diligence. *Id.* Even where an employee in the bargaining unit was aware of the changes, the Board did not consider this knowledge in and of itself sufficient to impose a due diligence requirement on the Union to investigate changes in working conditions or wage increases. *Id.* at 1247.

Although Good Shepherd told the employees of the decision to cease the wage increase on June 16, there is no credible evidence establishing that Dorn or another Union representative knew of the change at that time or shortly thereafter. The evidence only established that Dorn learned of the deferred wage increase at some point prior to the September 14 bargaining session when he raised the issue and Combs denied any knowledge of the change to Good Shepherd's customary annual practice of awarding merit increases. *See also NLRB v. Pub. Serv. Elec. & Gas Co.*, 157 F.3d 222, 228 (3d Cir. 1998) (stating that the statute of limitation period is not a bar to the claim when the delay in filing is a result of ambiguous conduct of another party). The fact that Combs professed ignorance on such a matter also suggests that such changes were not open and obvious enough.

Accordingly, Good Shepherd failed to meet its burden of establishing that the Union had either actual or constructive knowledge of the unilateral wage increase nor the changes to the duties of the bargaining unit employees more than six months prior to the changes.

CONCLUSIONS OF LAW

1. Good Shepherd Manor, Inc. (Respondent) is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The American Federation of State County and Municipal Employees (AFSCME) Council 31 AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally and without first bargaining with the Union to impasse when it: (a) changed the terms and conditions of employment of bargaining unit employees by ending its practice of providing employees with at least 1% annual merit wage increases on July 1, 2016 for fiscal year 2017 and again on July 1, 2017 for fiscal year 2018; and changed the terms and conditions of employment of bargaining unit employees on November 18, 2016 by implementing a new care worker mentor program and paying affected employees an hourly wage increase of 25 cents for assuming those duties.

4. The Respondent violated Section 8(a)(5) and (1) of the Act when it failed and refused to bargain in good faith with the Union on February 28, 2017.

5. The aforementioned unfair labor practices by the Respondent affected commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondent unlawfully withheld customary annual merit wage increases for fiscal years 2017 and 2018, I shall order the Respondent to make Unit employees whole for any loss of earnings and other benefits suffered as a result of the withheld increases. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, we shall order the Respondent to compensate its Unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and to file with the Regional Director for Region 25, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years. See *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[26]

ORDER

The Respondent, Good Shepherd Manor, Inc. Momence, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Unilaterally and without bargaining with the Union to impasse eliminating the practice of providing employees with an at least 1% annual merit wage increase, or otherwise changing employees' terms and conditions of employment without first giving the Union notice and an opportunity to bargain.

(b) Unilaterally and without bargaining with the Union to impasse implementing a new care worker mentor program and paying affected employees a wage increase, or otherwise changing employees' terms and conditions of employment without first giving the Union notice and an opportunity to bargain.

(c) Failing and refusing to bargain on request with the Union as the exclusive collective-bargaining representative of the unit employees.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) On request, bargain with the American Federation of State, County and Municipal Employees (AFSCME), Council 31, AFL-CIO, as the exclusive collective-bargaining representative of employees in the following unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> Included: All full-time and regular part-time non-professional employees including careworkers, instructors, trainers, infirmary technicians, receptionists, custodial service workers, maintenance employees, administrative support staff, assistant program directors, assistant supervisors, food service workers, secretaries, licensed practical nurses and transport staff employed by the Employer at its facility located at 4129 N. Rt. 1-17, Momence, IL 60954
>
> Excluded: All professional employees, managerial employees, and guards and supervisors as defined by the Act.

[26] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union.

(c) At the request of the Union, rescind the change in the terms and conditions of employment for its unit employees that was unilaterally implemented on about July 1, 2016, concerning providing employees with an at least 1% annual merit wage increase.

(d) At the request of the Union, rescind the change in the terms and conditions of employment for its unit employees that was unilaterally implemented on about November 18, 2016, concerning the new care worker mentor program and corresponding wage increase.

(e) Make unit employees whole for any loss of earnings and other benefits suffered as a result of the unilateral changes, in the manner set forth in the remedy section of this decision.

(f) Compensate affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 25, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year for each employee.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

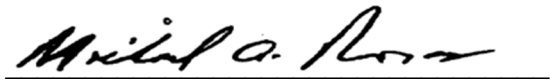
(h) Within 14 days after service by the Region, post at its Momence, Illinois facility copies of the attached notice marked "Appendix."[27] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own

[27] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 2016.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 25 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., October 23, 2017



Michael A. Rosas
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain in good faith with the American Federation of State, County and Municipal Employees (AFSCME), Council 31, AFL- CIO (the "Union") as the exclusive collective- bargaining representative of our employees in the following bargaining unit:

All full-time and regular part-time non-professional employees including careworkers, instructors, trainers, infirmary technicians, receptionists, custodial service workers, maintenance employees, administrative support staff, assistant program directors, assistant supervisors, food service workers, secretaries, licensed practical nurses and transport staff employed by the Employer at its facility located at 4129 N. Rt. 1-17, Momence, IL 60954: BUT EXCLUDING all professional employees, managerial employees, and guards and supervisors as defined by the Act.

WE WILL NOT refuse to bargain in good faith with the Union as the exclusive collective-bargaining representative of our employees in the bargaining unit concerning any proposed changes in wages, hours and working conditions before putting such changes into effect, including wage increases you may have been entitled to as a result of your annual evaluations and the creation of new positions such as mentors and the wage rates for those positions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, upon request, bargain in good faith with the Union as the exclusive collective-bargain representative of our unit employees concerning wages, hours, and working conditions. If an agreement is reached with the Union, we will sign a document containing that agreement.

WE WILL, if requested by the Union, rescind any or all changes we made without bargaining with the Union, including not paying wage increases you may have been entitled to as a result of your annual evaluations and creating a new position such as mentors and the wage rates for those positions.

WE WILL pay you for the wages lost because of not paying wage increases you may have been entitled to as a result of your annual evaluations.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Regional Director allocating the payments to the appropriate calendar year.

GOOD SHEPHERD MANOR, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

575 North Pennsylvania Street, Room 238, Indianapolis, IN 46204-1577

(317) 226-7381, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/25-CA-191404 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (317) 226-7413.